

**BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH**

DECISION ¹

FILE NUMBER: SVAR2015-00297

APPLICANTS: David & Megan Gee
22201 NE 28th Place
Sammamish, WA 98074

TYPE OF CASE: Consolidated: 1) Shoreline Management Act Variance to reduce the shoreline setback from 45 to 35 feet, to reduce a required wetland buffer from 50 to as little as 5 feet; and to reduce the required wetland buffer building setback from 15 to 5 feet; and 2) Shoreline Substantial Development Permit for construction of a single family residence for other than the current property owner

STAFF RECOMMENDATION: Approve both applications subject to conditions

EXAMINER DECISION: GRANT both applications subject to conditions

DATE OF DECISION: March 14, 2016

INTRODUCTION ²

David & Megan Gee (the Gees) seek approval of: a Shoreline Management Act (SMA) Variance (Shoreline Variance) to reduce the shoreline setback from 45 to 35 feet, to reduce a required wetland buffer from 50 to as little as 5 feet; and to reduce the required wetland buffer building setback from 15 to 5 feet; and an SMA Substantial Development Permit (SDP) for construction of a single family residence for other than the current property owner.

The Gees filed a Base Land Use Application on December 4, 2015. (Exhibit 2001 ³) The Sammamish Department of Community Development (the Department) deemed the application to be complete on December 15, 2015. (Exhibit 2002)

¹ This written Decision memorializes and expands upon an oral decision announced on the record at the close of the open record hearing.

² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

³ Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

The subject property is located in the 2100 block of West Beaver Lake Drive SE, Sammamish, Washington; Section 02, Township 24N, Range 6E, Willamette Meridian.

The Sammamish Hearing Examiner (Examiner) viewed the subject property on March 9, 2016.

The Examiner held an open record hearing on March 9, 2016. The Department gave notice of the hearing as required by the Sammamish Municipal Code (SMC). (Exhibit 2014)

Subsection 20.05.100(1) SMC requires that decisions on Shoreline Variances and SDPs be issued within 120 net review days after the application is found to be complete. The open record hearing was held on or about net review day 81. (Exhibit 2013, p. 4, Finding 19)

The following exhibits were entered into the hearing record during the hearing:

Exhibits 2001 - 2013: As enumerated in Exhibit 2013, the Departmental Staff Report
Exhibit 2014: Public hearing notice documentation

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The Gees own two abutting parcels lying between the west shoreline of Beaver Lake and West Beaver Lake Drive SE. The northerly lot (Lot B) presently contains a modest single-family residence. The southerly lot (Lot A) is presently undeveloped.⁴ The Gees now seek land use entitlements to allow construction of a single-family residence on Lot A. The Gees anticipate that they will sell Lot A with their successor building the residence to his/her/their own design.⁵ (Exhibits 2003; 2006; testimony)
2. Lot A (as well as the surrounding area between Beaver Lake and West Beaver Lake Drive SE) is zoned R-4, a single-family residential zone. (Exhibits 2008; 2013, p. 3, Finding 14) Beaver Lake, which has a total surface area of approximately 79 acres, is subject to the provisions of the SMA. The SMA jurisdictional area extends 200 feet back from the lake's ordinary high water mark

⁴ In or around the 2008 time period the Gees were considering a Boundary Line Adjustment (BLA) between Lots A and B. The BLA idea was subsequently abandoned. The depiction of a BLA on Exhibit 2007 is only an historical curiosity. (Exhibit 2007 and testimony)

⁵ If the Gees were going to reside in the residence after its construction, the residence would be exempt from the SMA's SDP requirement (but not exempt from compliance with SMP regulations). The SDP is required solely because the Gees will not be the owner-occupants of the residence. (Exhibit 2013, p. 5, Conclusion 1)

(OHWM). The SMA jurisdictional area along this portion of Beaver Lake is designated Shoreline Residential by the City's adopted Shoreline Management Master Program (SMP). (Exhibit 2010)

3. Lot A is 100 feet wide and has an average depth of about 380 feet. It's area totals 40,510 square feet (SF). Lot A has about 140 feet of frontage on Beaver Lake. Lot A is undeveloped and moderately forested. (Exhibits 2006; 2012) There is no public sewer service available in the area and none is expected to be available within the foreseeable future. Some residences in the area are served by on-site domestic water wells. (Exhibits 2006; 2007; testimony)
4. Lot A contains a 3,800 SF Category III wetland in the south central portion of the lot. Under applicable SMP regulations, the wetland requires a 50 foot buffer and an additional 15 foot building setback. The required buffer and setback extend well beyond both the north and south boundaries of Lot A, as well as encumbering approximately the south quarter of the property's lake frontage. (Exhibits 2006, Sheet A; 2011; 2012)

The required setback from the lake shoreline under the SMP is 45 feet plus an additional 5 foot building setback. (Exhibits 2006, Sheet A; 2013)

The lot immediately south of Lot A has a domestic water supply well located some 29 feet south of Lot A. Health regulations prevent placement of any portion of an on-site sewage disposal system or a residence within 100 feet of a domestic water well. The required 100 foot radius well protection zone encumbers much of the central portion of Lot A, partially overlapping the on-site wetland and its required buffer.⁶ (Exhibits 2006, Sheet A; 2013)

The only portion of Lot A available for installation of an on-site sewage disposal system is immediately adjacent to West Beaver Lake Drive SE. An on-site sewage disposal system has been approved for that area. (Exhibits 2006, Sheet A; 2007)

When all of those encumbrances are deducted from the site area, approximately 7,800 SF remains, divided between a small area along the north property line east of the wetland buffer and a slightly larger area west of the wetland buffer surrounding the sewage drainfield area. The eastern area cannot be accessed without passing through the wetland buffer. Lot A is essentially undevelopable if all regulations are adhered to. (Exhibit 2006, Sheet A)

5. The Gees discussed options for development of Lot A with City and Washington State Department of Ecology (Ecology) staff before and during the application review process. On January 12, 2016, the City's consulting biologist (ESA), the City Planner (Evan Maxim), and Ecology staff (Joe Burcar, Senior Shoreline Planner, and Paul Anderson, Wetlands Supervisor) conducted a site visit. The current proposal is the result of that collaborative process. (Exhibit 2013, p. 2, Finding 5)

⁶ Lot B has a well located about about 40 feet from the lake shoreline adjacent to its south property line. That well is not used for domestic purposes. Therefore, it is not subject to the 100 foot radius well protection zone. (Exhibit 2006; testimony)

6. The current proposal recognizes that relief from one or more of Lot A's encumbrances is necessary in order for any single-family residential use to be made of the lot. Ecology, the City, and the Gees concluded that a small reduction in the shoreline setback (from 45 to 35 feet) coupled with a larger reduction in wetland buffer (from 50 to as little as 5 feet) and a reduction in the buffer's building setback (from 15 to 5 feet) would be the best way to allow a residence with a 2,000 SF footprint to be built in the northeast quadrant of Lot A. A 2,000 SF footprint is smaller than the area's average residential footprint. Coupled with those reductions is an extensive wetland buffer mitigation proposal. (Exhibits 2003, pp. 16 - 19; 2006, Sheet B; 2011; testimony)
7. The Gees submitted a very detailed analysis of site conditions, a detailed mitigation plan, and a comprehensive analysis of all Shoreline Variance and SDP criteria. (Exhibits 2012; 2011; 2003, respectively) Those documents are incorporated herein by reference as if set forth in full with but one exception: Exhibit 2003 incorrectly states on exhibit page 10 that Beaver Lake is a "shoreline of statewide significance." Beaver Lake would have to have a surface area of 1,000 or more acres to qualify as a shoreline of statewide significance under the SMA. [RCW 90.58.030(2)(f)(iv)] It is, rather, simply a "shoreline" under the SMA. [RCW 90.58.030(2)(e)]

The Department submitted a detailed Staff Report which analyzes Shoreline Variance and SDP criteria. (Exhibit 2013) That document is also incorporated herein by reference as if set forth in full.
8. On February 2, 2016, Ecology provided the City with an e-mail comment letter which essentially recommends approval of the current proposal subject to two conditions. (Exhibit 2005) The Department has incorporated Ecology's recommendations into its recommended conditions. (Exhibit 2013)
9. The proposal is categorically exempt from the threshold determination requirements of the State Environmental Policy Act (SEPA). (Exhibit 2013, p. 3, Finding 11)
10. No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.
11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK⁷

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

⁷ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

An SSDP is normally a Type 2 procedure in which the Department acts administratively. [SMC 20.05.020, Exhibit A] A Shoreline Variance is a Type 4 procedure. When applications are consolidated for processing, they follow the highest numbered process type; in this case, Type 4. [SMC 20.05.020(2)] A Type 4 land use application requires an open record hearing before the Examiner. According to the SMC, the Examiner makes a final decision on Type IV applications which is subject to the right of reconsideration and appeal to the State Shorelines Hearings Board. [SMC 20.05.020, 20.10.240, 20.10.260, and 25.35.080(1)] However, state law requires that the local action on a Shoreline Variance (and Shoreline Conditional Use Permit) is technically subject to approval by Ecology, whose decision may be appealed to the Shorelines Hearings Board, a state quasi-judicial review board. [RCW 90.58.140(10)]

The Examiner's decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the Examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.

[SMC 20.10.070(2)]

Review Criteria

Section 20.10.200 SMC sets forth requirements applicable to all Examiner Decisions:

When the examiner renders a decision . . . , he or she shall make and enter findings of fact and conclusions from the record that support the decision, said findings and conclusions shall set forth and demonstrate the manner in which the decision . . . is consistent with, carries out, and helps implement applicable state laws and regulations and the regulations, policies, objectives, and goals of the interim comprehensive plan, the development code, and other official laws, policies, and objectives of the City of Sammamish, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public.

Subsection 25.08.020(2) SMC requires that a proposed Substantial Development be "consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and [the City of Sammamish shoreline master program]."

Subsection 25.08.050(1) SMC adopts the WAC 173-27-170 Shoreline Variance review criteria. The review criteria for a Shoreline Variance depend upon whether the proposal is located landward or waterward of the OHWM. [WAC 173-27-170] The applicable criteria have been set forth in Exhibits 2003 and 2013 and will not be repeated here.

Vested Rights

Sammamish has enacted a vested rights provision.

Applications for Type 1, 2, 3 and 4 land use decisions, except those that seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[SMC 20.05.070(1)] Therefore, this application is vested to the development regulations as they existed on December 15, 2015.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [SMC 25.08.050(4) and City of Sammamish Hearing Examiner Rule of Procedure 316(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. This is a simple, non-controversial case. The size and shape of Lot A, coupled with restrictions required by SMP and health regulations, render it unbuildable. The evidence, especially Exhibits 2003 and 2013, proves that statement. The evidence demonstrates that all of the many criteria for approval of the requested Shoreline Variances have been met.
2. The fundamental policy of the SMA is to plan for and foster all reasonable and appropriate uses on the state's shorelines. [RCW 90.58.020] The subject property is designated for residential use under the City's SMP. Without the relief requested herein, the subject property could not be put to that use. The requested Shoreline Variances are needed so that the policy is not thwarted.
3. An SDP typically includes a fairly detailed plan for the proposed use. In the present case, there is no such plan for the residence. Rather, because the Gees do not plan to build the residence themselves, they have presented only a maximum building footprint. That footprint was sized and located based upon consultation with City and Ecology staff.

Were this any use other than a single-family residence, the Examiner would in all likelihood decline to grant an SDP without a specific plan. But this Examiner is personally familiar with cases where preliminary subdivisions within the SMA jurisdictional area have been granted SDPs without house

plans for each of the lots. Given that the future residence will have to meet not only SMP regulations for residential uses, but also all other City development regulations, the Examiner is comfortable approving this SDP with only the maximum building footprint.

4. The recommended conditions of approval as set forth in Exhibit 2013 are reasonable, supported by the evidence, and capable of accomplishment with one addition and a few minor, non-substantive changes.

Section 173-27-190 WAC contains certain content and format requirements for any SDP which is issued:

(1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).

(2) Permits for substantial development, conditional use, or variance may be in any form prescribed and used by local government including a combined permit application form. Such forms will be supplied by local government.

(3) A permit data sheet shall be submitted to the department with each shoreline permit. The permit data sheet form shall be as provided in Appendix A of this regulation.

Subsection (1) requires that an additional condition be added to restrict the start of construction. Subsection (2) allows this Decision to serve as the Shoreline Variance and SDP. The data sheet required by Subsection (3) will be prepared by the Department when it transmits the SDP and supporting exhibits to the state as required by Chapter 90.58 RCW.

The Examiner will replace the word "Applicant" with "Permittee" wherever it occurs in the conditions. This approval runs with the land. A future owner would not be the "Applicant," but would still be obliged to comply with the terms of the permit. "Permittee" means the holder of the permit and thus covers everyone who may come into possession of the property.

5. Since the Gees do not intend to construct the single-family residence themselves, the Examiner wishes to remind them that an SDP has a finite term: Generally speaking, construction must be commenced within two years and completed within five years of the effective date of the SDP. [RCW 90.58.143]
6. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner:

- A. **GRANTS** City approval of the requested Shoreline Variance to reduce the shoreline setback from 45 to 35 feet, to reduce a required wetland buffer from 50 to as little as 5 feet in two locations; and to reduce the required wetland buffer building setback from 15 to 5 feet; and
- B. **GRANTS** the requested SDP for construction of a single family residence for other than the current property owner,

both **SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued March 14, 2016.



John E. Galt
Hearing Examiner

HEARING PARTICIPANTS⁸

Evan Maxim

Samuel Rodabough, sworn counsel

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, 801 228th Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

⁸ The official Parties of Record register is maintained by the City's Hearing Clerk.

**NOTICE of RIGHT of APPEAL
SHORELINE VARIANCE**

The ultimate decision by the Washington State Department of Ecology on the Shoreline Management Variance is final subject to the right appeal to the State Shorelines Hearings Board. Please see RCW 90.58.180 and Chapter 173-27 WAC for guidance regarding Hearings Board appeal procedures.

**NOTICE of RIGHT of APPEAL
SUBSTANTIAL DEVELOPMENT PERMIT**

The portion of this Decision regarding the Shoreline Management Act Substantial Development Permit is final and conclusive subject to the right of review before the State Shorelines Hearings Board in accordance with the procedures of Chapter 90.58 RCW, the Shoreline Management Act of 1971. See SMC 20.35.080, Chapter 90.58 RCW, and Washington Administrative Code regulations adopted pursuant thereto for further guidance regarding Hearings Board appeal procedures.

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

CONDITIONS OF APPROVAL
David and Megan Gee
SVAR2015-00297

This Shoreline Substantial Development Permit and Variance Permit are subject to compliance with all applicable provisions, requirements, and standards of the Sammamish Municipal Code, standards adopted pursuant thereto, and the following **SPECIAL CONDITIONS**:

General Conditions:

1. The Permittee is vested to, and shall comply with, applicable land use and development laws and ordinances in effect on December 15, 2015, the vesting date of the subject application. The Permittee shall also comply with other laws and ordinances applicable to development of the project (e.g., laws and ordinances to which application(s) do not vest).
2. The site and future single-family home shall be developed in substantial conformance with Exhibit 2006, Sheet B, subject to the conditions herein.
3. For the purpose of ensuring compliance with all conditions of approval and the standard requirements of the SMC, the Permittee shall provide financial guarantees in conformance with SMC Title 27A.
4. The Permittee shall make payment of street, park, and school impact fees in accordance to SMC Chapters 14A.15, 14A.20, and 21A.105, respectively.

Prior to building permit issuance:

5. The Permittee shall submit an updated wetland and shoreline buffer mitigation plan that incorporates the following changes:
 - a. Add butterfly bush to the list of invasive weeds targeted for control. (This species appears to have established on the site only recently, yet appears to be spreading quickly.)
 - b. Increase the proposed density of shrub plantings in two areas to increase visual and auditory screening between developed area and the wetland: 1) between the wetland and the rock wall; and 2) within the wetland along the south property boundary.
 - c. Replace *Rosa gymnocarpa* with a rose more tolerant of wetland conditions (such as *R. pisocarpa* or *R. nutkana*).
 - d. Add slough sedge (*Carex obnupta*) to portions of the wetland area that are seasonally flooded, to enhance amphibian breeding habitat potential.

HEARING EXAMINER DECISION
RE: SVAR2015-00297 (David & Megan Gee)
March 14, 2016
Page 12 of 12

(Name)

(Title)

(Date)